ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION III

CA07-932

February 13, 2008

MIGUEL MEZA-CABRERA
APPELLANT

V.

ARKANSAS DEPARTMENT OF HUMAN SERVICES and C.W. and M.M., Minor Children
APPELLEES

AN APPEAL FROM SEBASTIAN COUNTY CIRCUIT COURT
[JV2004-340]

HON. MARK HEWETT, JUDGE

AFFIRMED

On July 2, 2007, the Sebastian County Circuit Court terminated Miguel Meza-Cabrera's parental rights to his two children, C.W. (born March 3, 1999) and M.M. (born April 6, 2000). He appeals from that order, contending that the circuit court erred in terminating his parental rights after the Department of Human Services (DHS) failed to involve him in the case plan. He also contends that the termination of his parental rights was in error because the circuit court did not appoint him counsel until February 2006, although the court ordered the appointment in May 2004. We affirm, holding (1) that DHS was justified in not involving him in the case plan, given that he perpetrated sexual abuse on another child, and (2) that appellant failed to demonstrate that he was prejudiced by the circuit court not appointing him counsel until February 2006.

Facts

This case began on May 16, 2004, when Robbie McKay received a call from the Fort

Smith Police Department regarding three children left with a babysitter. According to her investigation, Shawnon Meza-Watie[1] left three of her children, J.W., C.M., and M.M., with another woman the previous Friday, stating that she would return that evening. The woman became ill and took the children to a second person in the same apartment complex, who kept the children until the following Sunday. This second person called police because she would no longer keep the children, Meza-Watie's whereabouts were unknown, and J.W. needed immediate medical attention. J.W. was later taken to the doctor and diagnosed with pneumonia. DHS exercised an emergency hold on the children and found Meza-Watie's two other children, K.T. and D.W., the next day. The home where they were found was overcrowded and not properly furnished for the five to eight children who were staying there. Meza-Watie said that she did not know the name of the person with whom she left three of her children, but she stated that she met her in jail. Due to the poor conditions and a lack of stability, DHS exercised an emergency hold on K.T. and D.W. as well.

The circuit court found probable cause to remove the children on May 20, 2004. The court stated in that order, "Separate attorneys shall be appointed to represent the mother and father in this matter." The order named three putative fathers in the case, but it listed appellant as the legal father. Paternity testing later proved that appellant was the biological father of M.M. and C.W.[2] The court adjudicated the children dependent-neglected on July 12, 2004. In a permanency-planning order entered May 23, 2005, the court changed the goal of the case from reunification to termination and adoption.

On September 22, 2005, Guadalupe and Jose Duenas, appellant's sister and brother-

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[1]On January 16, 2007, Meza-Watie consented to the termination of her parental rights.

[2]Appellant relinquished any parental rights he had pertaining to all of the other juveniles mentioned in the case. However, at the termination hearing, he asked the court to withdraw his consent with respect to K.T. and D.W. At the end of the hearing, the court noted that the consent to terminate was never officially withdrawn, and appellant does not appeal from that ruling.

in-law, moved to intervene in the case. In a review order entered December 29, 2005, the court held the motion to intervene in abeyance to explore whether provisional foster care was an option and to allow for a home study. The motion was continued again in an order filed February 17, 2006. The court also appointed counsel for appellant in this order. In a special review order filed February 24, 2006, the court also denied the Duenas' motion to change custody, finding that the change would not be in the children's best interest. However, it continued to hold the motion to intervene in abeyance and ordered that the Duenases' attorney be notified if M.M.'s and C.W.'s placement was disrupted. Finally, this order acknowledged that appellant was not in a position to work on a case plan, as he was incarcerated. The judgment and commitment order in the record indicates that appellant pleaded guilty to second-degree sexual assault, for which he received a ten-year term of imprisonment. A second permanency-planning hearing was held on May 5, 2006, and the resulting order, entered August 7, 2006, continued the goal of termination and adoption. DHS filed the termination petition on April 6, 2007.

The termination hearing was held June 1, 2007. At the beginning of the hearing, DHS introduced several exhibits, including many of the orders entered in the case. Appellant objected to the admission of orders entered prior to when he was represented by counsel, but the court admitted the exhibits over the objection.

Appellant testified that he was incarcerated at a facility in Malvern and that he was in a sexual-offender program. He had not taken any other courses, as he needed to complete the sexual-offender program first. He anticipated completing the treatment later that month, but acknowledged that he must repeat phases of the course due to problems he experienced with another inmate. Appellant admitted that he was in jail for sexually assaulting the daughter of the woman he was living with and that his children were in the home at the time of the abuse. He did not know whether he would be deported upon completion of his

sentence. He requested that his rights not be terminated and that the children be placed in his sister's custody. Regarding DHS's contact with him, he stated that he was brought from jail in May 2004 to participate in a hearing and that he had been incarcerated since then. He stated that he wrote a letter to DHS when he wanted to get in contact with his children, but that he never received anything in return.

Tiffany May stated that she was assigned the case in May 2004. She admitted that DHS never intended to reunify the children with appellant. She also testified that DHS had no plan in place to offer services other than what the prison authorizes. She opined that there would be a significant risk of emotional or physical harm if the children were placed in the custody of either parent and recommended that appellant's parental rights be terminated. May also acknowledged that appellant's sister and brother-in-law were always interested in having custody of the children, but that she (May) was concerned because they did not believe appellant had done anything wrong.

The order terminating appellant's parental rights was entered July 2, 2007. The court remarked that appellant's testimony demonstrated complete instability for the children. While the court acknowledged that it did not order any specific services for appellant, it found that there was little likelihood that the children could be placed with him within a reasonable period of time after his release.

Standard of Review

An order terminating parental rights must be based upon a finding by clear and convincing evidence that termination of a parent's rights is in the best interest of the children, considering the likelihood that the children will be adopted if the parent's rights are terminated and the potential harm caused by returning the children to the custody of the parent. Ark. Code Ann. § 9-27-341(b)(3)(A) (Supp. 2007). The court must also find one of the grounds outlined in § 9-27-341(b)(3)(B). While neither DHS nor the court specified the

grounds relied upon for termination in this case, the following grounds are pertinent:

> (viii) The parent is sentenced in a criminal proceeding for a period of time that would constitute a substantial period of the juvenile's life; or
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> (ix)(*a*) The parent is found by a court of competent jurisdiction, including the juvenile division of circuit court, to:
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> . . . .
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> (*3*)(*A*) Have subjected any juvenile to aggravated circumstances.
> (*B*) "Aggravated circumstances" means:
> (*i*) A juvenile has been abandoned, chronically abused, subjected to extreme or repeated cruelty, sexually abused, or a determination has been made by a judge that there is little likelihood that services to the family will result in successful reunification[.]

Termination of parental rights is an extreme remedy and in derogation of the natural rights of the parents. *Benedict v. Ark. Dep't of Human Servs.*, 96 Ark. App. 395, ___ S.W.3d ____ (2006). However, courts are not to enforce parental rights to the detriment or destruction of the health and well-being of a child. *Id.* A heavy burden is placed upon a party seeking to terminate the parental relationship, and the facts warranting termination must be proven by clear and convincing evidence. *Id.* Clear and convincing evidence is that degree of proof which will produce in the fact finder a firm conviction regarding the allegation sought to be established. *Id.* This court does not reverse the circuit court's finding of clear and convincing evidence unless that finding is clearly erroneous. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Id.*

Analysis

Arkansas Code Annotated section 9-27-341(b)(1)(A) allows a circuit court to consider a petition to terminate parental rights if it finds that there is an appropriate permanency placement plan for the juvenile. The statute does not require that the placement plan involve both parents. While appellant concedes that reunification of the children with him was inappropriate, he argues that DHS did not have a right to ignore him and contends that DHS

should have made him part of the case plan.

Nonetheless, we affirm, holding that DHS was justified in not involving him in the case plan. The case plan here made sense, as appellant sexually assaulted another child and did so while his children were also in the home. DHS would have placed the children at a high risk of physical and emotional harm had it involved appellant in the case plan. DHS's actions here were consistent with acting in the best interests of the children. Furthermore, the circuit court found that there was little likelihood that the children could be returned to appellant within a reasonable time after his release from incarceration. This constitutes "aggravated circumstances," as defined by Ark. Code Ann. §§ 9-27-303(6)(A) (Supp. 2007) and 9-27-341(b)(3)(B)(ix)(*a*)(*3*)(*B*)(*i*), and reunification efforts are not required if a court of competent jurisdiction finds that the parent has subjected the children to aggravated circumstances. *See* Ark. Code Ann. §§ 9-27-303(46)(C), 9-27-341(b)(3)(ix)(*b*). Because DHS was not required to offer reunification services, appellant cannot show prejudice resulting from DHS's failure to do so. *Cf. Williams v. Ark. Dep't of Health & Human Servs.*, 99 Ark. App. 95, ___ S.W.3d ___ (2007) (affirming when appellant was not prejudiced by the circuit court erroneously declining his motion to proceed pro se).

Appellant also contends that the failure to involve him with the case plan resulted in the circuit court not considering a goal other than adoption and termination of his parental rights. Arkansas Code Annotated section 9-27-338(c) (Supp. 2007) lists the permanency goals the circuit court is allowed to consider in order of preference. The top preference is returning the juvenile to the parents if it is the best interest of the juvenile. *See* Ark. Code Ann. § 9-27-338(c)(1). Appellant concedes that reunification was not an option. The second preference is adoption and termination of parental rights. *See* Ark. Code Ann. § 9-27-338(c)(2). Permanent relative placement is listed as the fourth preference. *See* Ark. Code Ann. § 9-27-338(c)(1). According to the public policy of this state, as pronounced by the

Arkansas General Assembly, termination and adoption are preferred to permanent relative placement, contrary to appellant's argument. Termination and adoption are to be pursued unless they are not in the juvenile's best interest, *see* Ark. Code Ann. § 9-27-338(c)(2), and appellant does not argue that termination of his parental rights was not in the children's best interests. Further, the Duenases filed a motion to intervene and participated in the case. Given their participation, the circuit court had the opportunity to consider permanent relative placement.

Finally, appellant asserts that the circuit court violated his statutory right to counsel. We agree that appellant was entitled to counsel even though he was incarcerated. We further agree that the May 2004 order providing that he be appointed counsel meant nothing without actual appointment of counsel.

Nonetheless, we affirm, despite appellant being wrongfully deprived of counsel for almost two years, because the failure to provide appellant with counsel was harmless. In *Briscoe v. Arkansas Department of Human Services*, 323 Ark. 4, 912 S.W.2d 425 (1996), the supreme court held that the lower court erred in not granting previous requests to appoint counsel, but held that the error was harmless because the final termination hearing aired all of the evidence presented at the hearings leading up to the termination of parental rights. We distinguished *Briscoe* in *Clark v. Arkansas Department of Human Services*, 90 Ark. App. 446, 206 S.W.3d 899 (2005), where we reversed an adjudication order when the circuit court failed to provide the appellant with counsel during that hearing. While appellant relies on *Clark*, that case is distinguishable from the instant case. There, the appellant was completely deprived of counsel at the hearing that was the subject of the appeal. Appellant here was represented by appointed counsel for more than a year before the hearing to terminate his parental rights. Thus, he has not demonstrated how the termination proceeding would have differed had he had the benefit of counsel before February 2006.

Appellant fails to show that he was prejudiced from not being involved in the case plan or in not having counsel for the first two years of this case. For these reasons, we affirm.

Affirmed.

ROBBINS and MARSHALL, JJ., agree.